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No. 06-1693

FILED
JUL 2 0 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MAHABIR NANAN, *et ux.*,

Petitioners,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Court Of Appeals

BRIEF FOR RESPONDENT STATE FARM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There are no questions properly before this Court.

RULE 29.6 STATEMENT

State Farm Fire and Casualty Company is a wholly owned subsidiary of State Farm Mutual Auto Insurance Company.

OPINIONS AND ORDERS

The Order of the Georgia Court of Appeals remanding the case to the trial court for a complete record is reproduced at Pet. App. 9a. The Georgia Supreme Court Order denying *certiorari* is at Pet. App. 14a. The Georgia Court of Appeals ruling on the merits of Petitioners' appeal is reported ___ Ga. App. ___ (Case no. A07A0119, decided June 29, 2007). (Resp. App. 1).

JURISDICTION

This Court lacks jurisdiction over this matter, as the petition does not meet the jurisdictional requirements of 28 U.S.C. § 1257(a) for *certiorari* to state courts.

STATEMENT OF CASE

Petitioners' brief in support of their petition alleges sweeping facts that are scandalous, irrelevant, and prohibited by Supreme Court Rule 24(6). Petitioners' facts are therefore not worthy of response, and are entirely disputed.

Petitioners' current claims arise out of a trial judge's order dismissing their lawsuit against Respondent for failing to comply with court orders relating to discovery matters. Specifically, Petitioners' suit was dismissed because they failed to allow a court-ordered home inspection or appear for a court-ordered deposition. Petitioners appealed the trial judge's dismissal of their suit to the Georgia Court of Appeals, which docketed the case as A06A0916. Albeit untimely, Petitioners filed a brief on the

merits, to which State Farm responded. The Court of Appeals, however, remanded the case back to the trial court because a transcript of the hearing at which the trial court ordered Petitioners to comply with Respondent's discovery requests was not included in the appellate record. Petitioners then sought review of the Court of Appeals Order remanding the case to the trial court in the Supreme Court of Georgia, which denied *certiorari*.

Meanwhile, thirteen days after the Court of Appeals remanded case A06A0916, the record was completed and the case redocketed as A07A0119. The Georgia Court of Appeals has since ruled on the merits and denied Petitioners' appeal in A07A0119. (Resp. App. 1). Petitioners, in turn, have filed a Motion for Reconsideration in the Georgia Court of Appeals. Thus, two appellate records have been created in the same case: A06A0916, which is the petition brought before this Court in which there is nothing in the record; and A07A0119, which is the appeal with the completed record that was decided on the merits and is pending before the Georgia Court of Appeals on a motion for reconsideration.

The routine, procedural Order in A06A0916 remanding the case back to the trial court for a complete record is what Petitioners now submit for review before this Honorable Court. By so doing, Petitioners attempt to conflate review of this Order into a meritless attack against Respondent and the entire Georgia judicial system.

ARGUMENT

This Court has no jurisdiction over this petition because it is not a final judgment by the state's highest court as required by 28 U.S.C. § 1257. For this Court to have jurisdiction over a state court judgment, the judgment must be final as an effective determination of the litigation, and not of merely interlocutory or intermediate steps therein. *Pierce County, Wash. v. Guillen*, 537 U.S. 129, 140, 123 S. Ct. 720 (2003). The state court judgment "must be final in two senses: it must be subject to no further review or correction in any other state or tribunal; it must also be final as an effective determination of the litigation . . . it must be the final word of a final court." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81, 118 S. Ct. 481 (1997).

The current petition is based on a non-final judgment. The Georgia Court of Appeals Order in case A06A0916 simply remanded the case to the trial court so that a transcript could be included in the record. It did not end the litigation. Rather, it remanded so that the case could be decided on the merits because there was nothing reviewable in case A06A0916. Indeed, once the record was complete, the case was redocketed as A07A0119, and proceeded to a final determination by the Court of Appeals. Thus, the Order in case A06A0916 on which review is sought is not the "final word of a final court." *See Jefferson*, 522 U.S. at 81. This Court is therefore without jurisdiction to decide this matter.

CONCLUSION

The petition does not seek review of a final judgment from the state's highest court as required by 28 U.S.C. § 1257. Accordingly, this Court is without authority to entertain Petitioners' petition for writ of *certiorari*.

Respectfully submitted,

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SECOND DIVISION
JOHNSON, P. J.,
PHIPPS and MIKELL, JJ.

June 29, 2007

In the Court of Appeals of Georgia

A07A0119. NANAN et al. v. STATE FARM INSURANCE COMPANY.

PHIPPS, Judge.

Mahabir and Shellielle Nanan sued State Farm Fire and Casualty Company for failure to pay a claim they made under their homeowners' insurance policy. State Farm denied the claim because of the Nanans' failure to comply with certain provisions of the policy. The state court dismissed the Nanans' complaint because of their refusal to comply with the court's discovery orders. The Nanans have filed this pro se appeal. Because they have failed to carry their burden of showing error in the judgment appealed, we affirm.

The Nanans brought this suit against State Farm on June 18, 2004, seeking $190,787.28 in damages based on State Farm's failure to compensate them for losses caused by a fire to their home. State Farm answered the complaint on July 16, asserting numerous defenses based on the Nanans' non-compliance with provisions of the policy by failing to submit a signed, sworn proof of loss with supporting documentation and by refusing to make their home available to State Farm for inspection.

It appears from the record that on December 22, State Farm filed notices to take the Nanans' depositions and to inspect their home. But after receiving an objection from the Nanans, State Farm filed amended notices scheduling

the inspection for January 10 and the depositions for January 11. According to State Farm, the inspection did not take place because the Nanans did not permit entry into their home on January 10 and failed to appear for their depositions the next day.

After conducting a hearing on State Farm's motion to compel in April 2005, the trial court entered an order in May compelling the Nanans to appear for the taking of their depositions on or before May 27 and to permit their home to be inspected by State Farm prior to the taking of their depositions. The order also provided for the imposition of sanctions, including dismissal of the Nanans' complaint, if they failed to comply. State Farm duly filed notices to take the Nanans' depositions and inspect their home in conformity with the time frame in the court's order. But this time the Nanans informed State Farm, both in writing and in a telephone conversation, that they would not be available to permit inspection of their home or to appear for their depositions until June. Yet after counsel for State Farm informed the court reporter and other parties that the depositions had been cancelled, the Nanans appeared at his office at the time for which the depositions had been scheduled.

On May 31, State Farm filed a motion seeking dismissal of the Nanans' complaint as a sanction for noncompliance with the court's discovery order. After the Nanans filed various counter motions, a hearing was conducted in July. At the hearing, the court ordered the Nanans to make their home available for inspection on August 1 and to appear for their depositions on August 5. The court carefully explained to the Nanans that it was giving them one last chance to comply with State Farm's discovery requests and that no additional changes in the

scheduling of their depositions or home inspection would be permitted without court order. In conformity with the court's order, State Farm filed notices to take the Nanans' depositions and inspect their home at the times specified by the court.

On August 2, State Farm filed a motion for sanctions on the ground that, without having obtained any protective order, the Nanans had refused to allow their home to be inspected on August 1. In support of its motion, State Farm submitted a copy of an objection to the inspection that it had received from the Nanans and an affidavit containing sworn testimony by State Farm's counsel. On August 10, State Farm filed a supplemental motion for sanctions on the ground that the Nanans had not appeared for the depositions on August 5. The supplemental motion was also supported by counsel's affidavit, among other things.

The Nanans filed a response to State Farm's motions, alleging that they had appeared for their scheduled depositions and denying State Farm's claim that they had refused to make their home available for inspection. Appended to the Nanans' response were various exhibits, such as an unsigned court order prohibiting State Farm from conducting the inspection of the Nanans' home. But none of the exhibits supported the allegations in the response. The court later entered an order dismissing the Nanans' complaint with prejudice because of their unjustifiable failure to comply with the court's order.

The Nanans filed a timely notice of appeal. Because a copy of the transcript of the July 2005 hearing was not included in the appellate record, we remanded the case to the trial court so that a complete record could be prepared

and the appeal re-docketed. Apparently dissatisfied with the remand, the Nanans filed a petition for writ of certiorari that the Supreme Court of Georgia denied. Meanwhile, the record was completed and the case re-docketed, after which the Nanans filed a motion to dismiss the appeal. We treated that motion as a motion to withdraw the appeal, and we granted it. The Nanans, however, filed a brief objecting to that, so we entered an order vacating the withdrawal order and reinstating the appeal.

1. The Nanans claim that, contrary to the trial court's finding, they were in fact deposed on August 5. By sworn affidavit, however, counsel for State Farm has averred otherwise. And the Nanans have presented no affidavits or any other evidentiary material contradicting counsel's testimony. State Farm, therefore, carried its burden of showing that the Nanans did not appear for their depositions. And the Nanans have not carried their burden of showing by the record that the court erred in finding otherwise.[1]

2. The Nanans contend that the court erred in dismissing their complaint as a sanction for noncompliance with the discovery order without first conducting a hearing.

> [I]n essence, what the law contemplates under OCGA § 9-11-37 is a two-step proceeding before the ultimate sanction of dismissal . . . may be imposed. First, a motion to compel must be filed and granted; second, after the party seeking sanctions notifies the court and the obstinate

[1] See, e.g., *Wimbley v. Washington Mut. Bank*, 271 Ga. App. 477, 478 (610 SE2d 124) (2005).

> party of the latter's failure to comply with the order granting the motion to compel and of the moving party's desire for the imposition of sanctions, the trial court may apply sanctions after giving the obstinate party an opportunity to be heard and determining that the obstinate party's failure to obey was willful.[2]
>
> (T)he trial court need not conduct a hearing on the issue of wilfulness in every case. Such a requirement serves no purpose where the trial court can otherwise determine wilfulness on the part of the party against whom the sanctions are sought. For example, in a case where a trial court has already conducted a hearing on a prior motion to compel, the record may already contain enough evidence of the obstinate party's willful behavior that any hearing on the issue of willfulness would simply be duplicative.[3]

The record here amply shows the Nanans' willful noncompliance with the court's May and July 2005 discovery orders after they had appeared at hearings that preceded entry of each order. State Farm filed motions for sanctions for the Nanans' noncompliance with the latter order, and the Nanans filed their responses. Viewing the motions, the responses, and the material supporting each, the court, without conducting yet another hearing, was authorized to find the Nanans in willful noncompliance

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[2] *McConnell v. Wright*, ___ Ga. ___ (Case No. S06G2026, decided April 24, 2007) (citation and punctuation omitted).

[3] Id. (citations and punctuation omitted).

with the court's final discovery order and to dismiss their complaint.[4]

3. The Nanans charge the trial court with error in dismissing their complaint during the pendency of a motion they had filed for recusal of the trial judge.

The Nanans filed their recusal motion after the July 2005 hearing. In the motion, they complained of the court's bias and prejudice toward them. But those claims find no support in the record. Moreover, the motion was not supported by any affidavits. And the motion, not filed until July, alleged grounds for disqualification that the Nanans would have first learned of in May. As such, the motion was neither timely nor legally sufficient.[5] Therefore, the court did not err in disregarding the motion and continuing to act upon the merits of the case.

4. The Nanans complain of State Farm's failure to abide by rules in OCGA §§ 9-11-34 and 9-11-26 in making its requests for inspection of their home. The Nanans have not, however, carried their burden of showing by the record that State Farm committed any rule violations. Nor does the record reflect any objections by the Nanans to any of State Farm's discovery requests on any of these grounds.

5. Similarly, there is no support in the record for the Nanans' complaint that the court forced them to prosecute this case without representation by counsel.

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[4] See generally *Woods v. Gatch*, 272 Ga. App. 642 (613 SE2d 187) (2005).

[5] See Uniform Superior Court Rule 25.1-25.3.

Judgment affirmed. Johnson, P. J., and Mikell, J., concur.